Supreme Court, U.S.
FILED

011637 MAY -5 2002

OFFICE OF THE CLERK

No. -_____

In The

Supreme Court Of The United States

JESSE HERNANDEZ

Petitioner,

v.

C. A. TERHUNE, DIRECTOR
DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA

Respondent .

Petition For A Writ Of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the rulings of the United States Court of Appeals for the Ninth Circuit, on appeal and on Petition for Rehearing, denied Appellant due process of law in the pursuit of a writ of habeas corpus pursuant to 28 U.S.C. Section 1257.

PARTIES TO THE PROCEEDINGS

The Petitioner is Jesse Hernandez, a state prison inmate incarcerated in the custody of the Department of Corrections for the State of California. Petitioner is an individual and there are no disclosures to be made pursuant to Supreme Court Rule 29b. Respondent is the Director of the Department of Corrections for the State of California, who was the Respondent in all lower court proceedings.

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The rulings of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's Appeal and Petition for Rehearing are included herein at the Appendix, pages A-1 to A-10.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its order denying rehearing below, and its modification of the original opinion denying appellate relief on January 9, 2002. (Appendix, pages A-5 to A-10). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

TEXT OF STATUTES/CONSTITUTIONAL PROVISIONS CITED

"No person shall...be deprived of life, liberty or property, without due process of law...."

United States Constitution, Amendment V.

STATEMENT OF THE CASE

This case originated in the Superior Court for the County of San Diego, State of California, in which Court Petitioner was convicted, after jury trial, of willful and premeditated attempted murder, possession of a destructive device, attempted arson, vandalism, and stalking. By its judgment entered on September 9, 1996, the Superior Court sentenced Petitioner to life in prison with the possibility of parole on the attempted murder charge, plus an additional determinate term of four years and four months on the lesser offenses. Petitioner duly appealed to the Court of Appeals of California, alleging in part that he had been deprived of effective assistance of counsel in the trial of the action. Said appeal was denied in its entirety, and an untimely Petition for Review was thereafter presented to the Supreme Court of the State of California. It is undisputed that the Petition for Review was rejected by notice from the Clerk of the California Supreme Court on grounds of untimeliness. In said Petition for review, Petitioner expressly argued that he was denied effective assistance of counsel in the trial of the action.

On April 16, 1999, Appellant filed a Petition for Habeas Corpus Relief in the District Court for the Southern District of California, pursuant to 28 U.S.C. Section 2254. Said Petition was denied without prejudice on May 4, 1999, based upon the Court's conclusion that Appellant had failed to allege exhaustion of state judicial remedies.

On July 7, 1999, Appellant filed an Amended Petition for Habeas Corpus Relief. As a consequence, the District Court filed its order reopening the case and setting a briefing schedule.

On December 3, 1999, Magistrate Judge John A. Houston filed a Report and Recommendation, concluding that habeas relief should be denied. Petitioner's objections to the Report and Recommendation were filed on December 30, 1999.

On September 1, 2000, the District Court entered its judgment adopting the Report and Recommendation of the Magistrate.

On September 29, 2000, Appellant filed an Application for Certificate of Appealability. On October 3, 2000, the District Court granted said certificate.

Appellant's initial Writ Petition in April 1999 alleged that he had been deprived of effective assistance of counsel in a state criminal proceeding, both at the trial and appellate levels. The contention as to trial counsel was that Appellant's jury trial was marred by ineffective assistance in the form of trial counsel's failure to object to the introduction of inflammatory "other act" evidence, and counsel's failure to seek severance of counts not properly joined for trial.

With respect to appellate counsel, Petitioner alleged ineffective assistance by way of counsel's failure to file a timely petition for review in the California Supreme Court.

The District Court denied Appellant's initial Petition on May 4, 1999, on the stated grounds that:

> ...Petitioner has not indicated he has exhausted state judicial remedies. Although Petitioner alleges he filed a Petition for Review in the California Supreme Court, he states that it was denied as untimely. Thus, it appears Petitioner has not given the California Supreme Court a fair opportunity to rule on the merits of the claims contained in his Petition. Petitioner has the ability to file a habeas petition with the California Supreme Court.

By virtue of the above holding, the District Court denied the initial Petition without prejudice, and instructed Petitioner to file a First Amended Petition on or before July 7, 1999.

Petitioner submitted an Amended Petition on July 7, 1999, in which it was noted that Petitioner had submitted a Petition for Habeas Corpus Relief in the California Supreme Court on July 2, 1999. The state Supreme Court Petition sought relief in the form of consideration on the

merits of Appellant's substantive ineffective assistance claims re trial proceedings.

Upon the filing of the Amended Habeas Petition in the District Court, the Court reopened the case, and ordered the Respondent to file a responsive pleading. In that order, the District Court offered two options to Respondent. If it was to be asserted that the Petitioner's claims were procedurally barred for any reason, Respondent was to file a motion to dismiss which was not to address the substantive merits of the claim. If Respondent determined that the Petition should be considered on the merits, it was to file an answer with supporting documentation.

On September 15, 1999, Respondent filed a Motion to Dismiss the second Section 2254 Petition, based on the claim that (1) Petitioner's state Supreme Court habeas action was still pending, and (2) Petitioner's Supreme Court Habeas Petition did not call upon the state tribunal to decide the underlying claims of ineffective assistance at trial, which were the central issues in the case.

On October 18, 1999, Petitioner filed a Memorandum of Law in Opposition to the above contentions, which Memorandum noted that on September 29, 1999, the California Supreme Court had denied Appellant's Habeas Petition without comment.

After consideration of all the pleadings filed by the parties, on December 3, 1999, Magistrate Judge John A. Houston issued a Report and Recommendation that the

Amended 2254 Petition be denied, on the ground that "...the California Supreme Court has not had the opportunity to decide the merits of petitioner's instant claims of ineffective assistance of counsel at trial....Therefore, petitioner's instant claims remain unexhausted...."

Petitioner filed objections to the Magistrate's Report on December 30, 1999, and on September 1, 2000, the District Court issued its order adopting the Report and Recommendation. The central basis of the District Court's ruling was the concept that ineffective assistance of appellate counsel is not sufficient cause to excuse procedural default on the state level, for purposes of a viable Section 2254 petition.

Appellant submitted an Application for a Certificate of Appealability in the matter, which Petition was granted on October 3, 2000. The language of the order indicates that the District Court intended to limit the issue on appeal to whether exhaustion of the claim of ineffective appellate assistance constitutes "the cause showing necessary to excuse a procedural default." The District Court is empowered to limit the scope of appealable issues pursuant to 28 U.S.C. 2253(c)(3).

Petitioner pursued his appeal from the denial of habeas relief in the District Court, and on November 20, 2001, the Ninth Circuit Court of Appeals filed its memorandum decision denying the appeal. (Appendix, pages A-1 to A-4.) The central ruling in the denial of the

appeal was that ineffective assistance of appellate counsel does not amount to a cognizable violation of the Sixth Amendment to the United States Constitution. Accordingly, the Court held that any error of appellate counsel that led to a default in the state court cannot constitute cause to excuse the procedural default in federal habeas proceedings.

On or about December 3, 2001, Petitioner sought rehearing before the Ninth Circuit Court of Appeals, noting that the Court's memorandum contained the following pertinent conclusions:

> Although we find that Hernandez has now sufficiently exhausted all of his claims, we affirm the dismissal on the grounds of procedural default.
>
> (Appendix, page A-2.)

> (Appellant's habeas petition to the California Supreme Court) seeking consideration of his original petition for review because of the ineffective assistance of appellate counsel . . . sufficiently exhausted his claims of ineffective assistance of <u>both</u> trial and appellate counsel.
>
> (Appendix, page A-2.)

> Hernandez's ineffective assistance of trial counsel claim is now procedurally barred because the California Supreme Court refused to address the claims in Hernandez's petition for review on the grounds that it was filed late.
>
> (Appendix, page 2)

While the facts underlying the Court's analysis were correct, counsel submitted that the Court's opinion overlooked an entire body of law cited by Petitioner with respect to proper interpretation of unexplained denial of habeas relief by state tribunals, including the California Supreme Court. The underlying Petitioner's contentions consisted in the assertion that the state Supreme Court's unexplained denial of the habeas corpus remedy could have arisen from at least two distinct rationales. The denial may have been based upon a conclusion that Petitioner could not constitutionally claim ineffective assistance of appellate counsel as to the late Petition for Review, or it could have been based on a conclusion that the underlying claim of ineffective assistance at trial was simply not meritorious. The critical point is that the basis of the habeas denial cannot be determined from the bare and unexplained order of the state Supreme Court.

Petitioner's appellate pleadings noted that it has been held that a federal constitutional claim may be barred from consideration in a Section 2254 proceeding if, and only if, the final state court dispositional order contains a "plain statement that its decision rests upon adequate and

independent state grounds." Michigan v. Long, 463 U.S. 1032, 1042 (1983); Harris v. Reed, 489 U.S. 353, 361 (1988).The Appellate Court, in Hunter v. Aispuro,982 F.2d 344 (9th Cir. 1992), had occasion to apply this principle in the face of a bare denial of habeas corpus relief by state tribunals, in the context of argument raised before the state courts that the issues raised in the state habeas petition had been previously waived. The question before the court in the Hunter decision was whether the bare denial of relief in the state courts rested upon an adequate and independent state ground, i.e., waiver. Noting the requirement in Harris v. Reed, that the final state dispositional order must articulate an independent state ground for denial of relief, the Hunter court, at page 347, held that in denying relief under Section 2254, the District Court is obliged to determine "whether the Supreme Court actually relied on the procedural bar." No such specific determination appears in the District Court habeas ruling herein Moreover, the Hunter court, at page 348, rested its findings upon an earlier Ninth Circuit case, Harris v. Superior Court, 500 F.2d 1124, 1127-29 (9th Cir. 1974), in which it was held that where the California Supreme court follows its usual practice of bare denials of habeas relief, the federal tribunal will presume that the denial was on the merits of the underlying constitutional claims. See also, Larue v. McCarthy, 833 F.3d 140, 143 (9th Cir. 1987).

None of the foregoing principles were addressed in the Appellate Court's unpublished opinion, and counsel respectfully submitted that they should be taken into consideration.

In response to Petitioner's request for rehearing, on January 9, 2002, the Ninth Circuit issued its order denying rehearing and amending the memorandum opinion to include the following paragraph:

> "Assuming that the California Supreme Court's bare denial of the habeas petition addressed the ineffective assistance of trial counsel claim, we must presume that the rejection of that claim on habeas review was also on procedural grounds. The last reasoned state decision on the ineffective assistance of trial counsel claim was the California Supreme Court's denial on direct appeal on the explicitly procedural ground that the petition for review was filed late. Because 'the last reasoned opinion explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits.' Ylst v. Nunnemaker , 501 U.S. at 803."
>
> (Appendix, page s A-5 to A-6)

It was presumably on the basis of the added paragraph that the Ninth Circuit rejected the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. District and Appellate Court Rulings Herein Effectively and Erroneously Deprived Petitioner of Due Process.

Counsel for Petitioner respectfully submits that the instant case represents a situation where a life-sentence state prisoner has been erroneously denied a hearing on the merits of his federal habeas petition, on the basis of rules of law announced by this Honorable Court in the handling of claimed procedural defaults in the pursuit of state remedies. In addition, the rulings of the Ninth Circuit herein are contrary to settled precedent within that Circuit.

As noted in the Statement of the Case, the central judicial events at issue consist of the denial of direct appellate review by the California Supreme Court, on untimeliness grounds, and a subsequent bare denial of habeas corpus relief in that Court without a statement of reasons. It must be reemphasized that in the Petition for Habeas Relief in the California Supreme Court, Petitioner expressly referenced the prior denial of habeas relief in the Federal District Court, and that Court's assertion that habeas relief was still available in the state system. Moreover, the habeas petition to the California Supreme Court specifically argued that Petitioner had been deprived of effective assistance at both the trial and appellate levels, and noted that the state Supreme Court is vested with

absolute discretion in deciding whether to accept a case for determination on the merits. In Petitioner's Request for Rehearing in the Ninth Circuit, it was noted that under California law, the state Supreme Court is vested with power to extend habeas corpus relief despite the fact that the particular case in question may be procedurally flawed. In re Newborn, 53 Cal.3d 786, 789 (1960); In re Panchot, 70 Cal.2d 105, 107 (1968); In re Retchel, 68 Cal.2d 397, 399, n.4 (1968).

Because the state Supreme Court was in fact vested with discretion to entertain Petitioner's habeas trial claims on the merits, Petitioner argued that the bare denial of relief cannot be presumed to have been based on the procedural default. The Petitioner further cited this Honorable Court's ruling to the effect that a federal constitutional claim may be barred from consideration in a Section 2254 proceeding only if the final state dispositional order contains a "plain statement" that its decision rests upon adequate and independent state grounds. Michigan v. Long, supra; Harris v. Reed, supra. There is no such "plain statement" attendant upon the state Supreme Court's bare denial of habeas relief.

Even under applicable Ninth Circuit precedent, it is held that a bare denial of habeas relief by the California Supreme Court will generate a presumption that the denial was on the merits of the underlying constitutional claims. See Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992); Harris v. Superior Court, 500 F.2d 1124, 1127-29 (9th Cir. 1974).

Upon the Petitioner's request for rehearing, the Ninth Circuit amended its memorandum opinion to hold that where the last "reasoned opinion" denying state relief rested upon procedural default, the Court must presume that any later denial of the claim likewise rested upon the procedural bar. The court cited Ylst v. Nunnemaker, 501 U.S. 797 (1990) for this proposition. Ylst involved a state prisoner who alleged Miranda violations and ineffective assistance of counsel at the trial level. The state Court of Appeal rejected the appeal on the sole ground that Miranda claim was waived by failure to object at trial. The state Supreme Court rejected discretionary review. The defendant then sought habeas relief in all three levels of the state courts, culminating in a denial of relief by the state Supreme Court on the ground that contentions raised on direct appeal may not be relitigated on habeas corpus. A second petition for habeas relief in the state Supreme Court was rejected without comment.

In defendant's federal habeas petition, relief was denied because (1) the Miranda issue was barred by the previous waiver ruling, and (2) the ineffective assistance claim was denied on the merits. The defendant then appealed to the Ninth Circuit, which held that the ineffective assistance claim was meritless, but that the Miranda claim was still viable because the last state Supreme Court habeas ruling was silent on the waiver ruling made by the Appellate Court, citing Harris v. Reed, supra.

In resolving this procedural conundrum, this Honorable Court announced a rule of "looking through" the last silent state court ruling, to the last explained state court judgment on the constitutional claim at issue. In Ylst, it was the state appellate opinion holding that the Miranda claim was waived at trial. Such "waiver" was an independent state ground barring federal review.

Ylst is factually inapposite for at least two reasons. First, Ylst at page 806 noted that the denial of discretionary review by the state Supreme Court "is not even a judgment," and thus the state appellate opinion was the controlling explained judgment.

In the instant case, Petitioner's claim of ineffective assistance at trial was addressed and denied on the merits at the state appellate level. Consequently, the denial of discretionary Supreme Court review and the bare denial of state Supreme Court habeas relief do not constitute the last "reasoned opinion" on the constitutional issue of ineffective assistance at trial. The Ylst opinion has consistently been cited for the proposition that when there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment are presumed to rest upon the same ground. See Simpson v. Sparkman , 94 F.3d 199, 262 (6th Cir. 1996). The state Supreme Court bare denial of habeas relief herein meets the foregoing description.

Finally, it must be noted that there is an inherent tension between Ylst and the settled Ninth Circuit rule that a bare denial of relief by the state court of last resort will be presumed to be on the merits of the federal claim. Hunter v. Aispuro, supra. Hunter ultimately rests upon the proposition that the California Supreme Court had continued its practice of bare habeas denials after 20 years of notice that the Ninth Circuit viewed these dispositions as being on the merits. Hunter, supra, at 347-48. The Ylst analysis was distinguished in Hunter, at page 347, because no reasoned state opinion existed denying the federal claim on the merits. That is not the case herein.

2. The Question at Issue Merits Supreme Court review.

By this petition, counsel respectfully submits that the Ylst opinion does not address nor justify the denial of this Petitioner's access to federal review of his conviction. There was a reasoned state judgment at the appellate level rejecting Petitioner's constitutional claims, and the state Supreme Court denial of Petitioner's habeas petition adds nothing to the calculus of "reasoned judgment."

Other defendants in Petitioner's position can be denied access to the federal court despite the still existing presumption in Hunter v. Aispuro, supra. At least one circuit has declined to adopt the Hunter presumption. Simpson v. Sparkman, 94 F.3d 199, 203 fn. 1 (6th Cir. 1996).

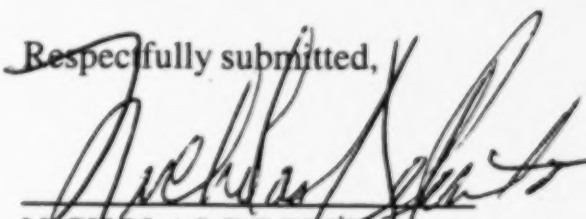
Counsel respectfully submits that there still remains confusion and split of authority on the proper application of the Ylst analysis, and that this case presents critical issues on the right of access to federal habeas corpus relief.

CONCLUSION

By virtue of the foregoing considerations, counsel for Petitioner respectfully submits that this matter merits review by this Honorable Court, and that the ruling of the Ninth Circuit barring Petitioner's access to federal review of his case should be vacated and set aside.

Date: April 3, 2002

Respectfully submitted,



NICHOLAS DE PENTO
Attorney for Petitioner

APPENDIX

FILED
NOV 20 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-56710
D.C. NO. CV-99-08725-DT(E)

MEMORANDUM*

JESSE DALE HERNANDEZ,
Petitioner-Appellant,

v.

A. TERHUNE, Director of the California Department of Corrections; DEPARTMENT OF CORRECTIONS
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted September 14, 2001
Pasadena, California

Before: B. FLETCHER, T.G. NELSON and BERZON, Circuit Judges.

* This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Jesse Hernandez appeals the district court's denial and dismissal without prejudice of his petition for habeas corpus. We affirm. Because the parties are familiar with the facts, we recount them only as necessary to explain our decision. Although we find that Hernandez has no sufficiently exhausted all of his claims, we affirm the dismissal on the grounds of procedural default.

1. Hernandez claimed ineffective assistance of appellate counsel in his habeas petition to the California Supreme Court. Although he did not directly claim ineffective assistance of trial counsel in that petition, his argument seeking consideration of his original petition for review because of the ineffective assistance of appellate counsel in filing the petition late sufficiently exhausted his claims of ineffective assistance of both trial and appellate counsel.

Moreover, exhaustion is satisfied "if it is clear that the claims are now procedurally barred under [state] law." Gray v. Netherland, 518 U.S. 152, 162 (1996). Hernandez' ineffective assistance of trial counsel claim is now procedurally barred, because the California Supreme Court refused to address the claims in Hernandez' petition for review on the grounds that it was filed late.

2. Although Hernandez' claims are now exhausted, "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner

can demonstrate cause and prejudice for the default." Gray, 518 U.S. at 162. Hernandez contends that the late filing resulted from an error by his appellate counsel that amounted to ineffective assistance. As a result of the alleged ineffective assistance of his appellate counsel, Hernandez claims that we should find cause to excuse his procedural default and reach the merits of the claims in his federal habeas petition.

Counsel's act or omission will not establish cause for procedural default unless it constitutes ineffective assistance under the Sixth Amendment. Murray v. Carrier, 477 U.S. 478, 487-88 (1986). There is no constitutional right to counsel on discretionary appeals, see Ross v. Moffitt, 417 U.S. 600, 610-11 (1974), and thus retained counsel's ineffective assistance provided on a discretionary appeal does not amount to a violation of the Sixth Amendment, see Wainwright v. Torna, 455 U.S. 586, 587 (1982) (finding no ineffective assistance where counsel failed to file a timely application for certiorari to the state supreme court because there is no constitutional right to counsel to pursue discretionary state appeals). For this reason, there is no merit to Hernandez's ineffective assistance of appellate counsel claim, and any error of appellate counsel that led to default of Hernandez' claims in state court cannot constitute cause to excuse the procedural default in federal habeas proceedings. See Coleman v. Thompson, 501 U.S. 722, 757 (1991). Thus, Hernandez has failed to show cause to excuse the procedural default on his ineffective assistance of trial counsel claim, and the district court properly dismissed his

habeas petition.

The decision of the district court is AFFIRMED.

FILED
JAN 09 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-56710
D.C. NO. CV-99-08725-DT(E)

ORDER DENYING PETITION FOR REHEARING, REJECTING THE SUGGESTION FOR REHEARING EN BANC, AND AMENDING THE MEMORANDUM DISPOSITION

JESSE DALE HERNANDEZ,
Petitioner-Appellant,

v.

A. TERHUNE, Director of the California Department of Corrections; DEPARTMENT OF CORRECTIONS
Respondents-Appellees.

Before: B. FLETCHER, T.G. NELSON AND BERZON, Circuit Judges.

The Memorandum Disposition filed on November 20, 2001, is amended as follows:

After the paragraph on page 2 ending with "on the grounds that it was filed late' add a paragraph that reads:

> "Assuming that the California Supreme Court's bare denial of the habeas petition addressed the ineffective assistance of trial counsel claim, we must presume that the rejection of that claim on habeas review was also on procedural grounds.

> The last reasoned state decision on the ineffective assistance of trial counsel claim was the California Supreme Court's denial on direct appeal on the explicitly procedural ground that the petition for review was filed late. Because "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits." Ylst v. Nunnemaker, 501 U.S. at 803. The Supreme Court's bare denial of the habeas petition therefore does not alter our conclusion that the ineffective assistance of trial counsel claim is procedurally barred."

With this amendment, Judges T.G. Nelson and Berzon have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc, and Judge B. Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P.35.

The petition for hearing is denied and the suggestion for rehearing en banc is REJECTED.

FILED
JAN 09 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 00-56710
D.C. NO. CV-99-08725-DT(E)

AMENDED MEMORANDUM*

JESSE DALE HERNANDEZ,
Petitioner-Appellant,

v.

A. TERHUNE, Director of the California Department of Corrections; DEPARTMENT OF CORRECTIONS
Respondents-Appellees.

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for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted September 14, 2001
Pasadena, California

Before: B. FLETCHER, T.G. NELSON and BERZON, Circuit Judges.

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Jesse Hernandez appeals the district court's denial and dismissal without prejudice of his petition for habeas corpus. We affirm. Because the parties are familiar with the facts, we recount them only as necessary to explain our decision. Although we find that Hernandez has now sufficiently exhausted all of his claims, we affirm the dismissal on the grounds of procedural default.

1. Hernandez claimed ineffective assistance of appellate counsel in his habeas petition to the California Supreme Court. Although he did not directly claim ineffective assistance of trial counsel in that petition, his argument seeking consideration of his original petition for review because of the ineffective assistance of appellate counsel in filing the petition late sufficiently exhausted his claims of ineffective assistance of both trial and appellate counsel.

Moreover, exhaustion is satisfied "if it is clear that the claims are now procedurally barred under [state] law." Gray v. Netherland, 518 U.S. 152, 162 (1996). Hernandez's ineffective assistance of trial counsel claim is now procedurally barred, because the California Supreme Court refused to address the claims in Hernandez' petition for review on the grounds that it was filed late.

Assuming that the California Supreme Court's bare denial of the habeas petition addressed the ineffective assistance of trial counsel claim, we must presume that the rejection of that claim on habeas review was also on procedural grounds. The last reasoned state decision on the ineffective assistance of *trial* counsel claim was the California Supreme Court's denial on direct appeal on the explicitly procedural ground that the petition for review was filed late. Because "the last reasoned opinion on the

claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard the bar and consider the merits." Ylst v. Nunnemaker, 501 U.S. at 803. The Supreme Court's bare denial of the habeas petition therefore does not alter our conclusion that the ineffective assistance of trial counsel claim is procedurally barred.

2. Although Hernandez's claims are now exhausted, "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." Gray, 518 U.S. at 162. Hernandez contends that the late filing resulted from an error by his appellate counsel that amounted to ineffective assistance. As a result of the alleged ineffective assistance of his appellate counsel, Hernandez claims that we should find cause to excuse his procedural default and reach the merits of the claims in his federal habeas petition.

Counsel's act or omission will not establish cause for procedural default unless it constitutes ineffective assistance under the Sixth Amendment. Murray v. Carrier, 477 U.S. 478, 487-88 (1986). There is no constitutional right to counsel on discretionary appeals, see Ross v. Moffitt, 417 U.S. 600, 610-11 (1974), and thus retained counsel's ineffective assistance provided on a discretionary appeal does not amount to a violation of the Sixth Amendment, see Wainwright v. Torna,455 Y,S, 586, 587 (1982) (finding no ineffective assistance where counsel failed to file a timely application for certiorari to the state supreme court because there is no constitutional right to counsel to pursue discretionary state appeals). For this

reason, there is no merit to Hernandez's ineffective assistance of appellate counsel claim, and any error of appellate counsel that led to default of Hernandez's claims in state court cannot constitute cause to excuse the procedural default in federal habeas proceedings. See Coleman v. Thompson, 501 U.S. 722, 757 (1991). Thus, Hernandez has failed to show cause to excuse the procedural default on his ineffective assistance of trial counsel claim, and the district court properly dismissed his habeas petition.

The decision of the district court is AFFIRMED.

Supreme Court, U.S.
FILED

011637 MAY - 5 2002

OFFICE OF THE CLERK

No. -_____

In The
Supreme Court Of The United States

JESSE HERNANDEZ

Petitioner,

v.

C. A. TERHUNE, DIRECTOR
DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA

Respondent .

Petition For A Writ Of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SOUTHERN DISTRICT OF CALIFORNIA
BY: [illegible] DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSE DALE HERNANDEZ,	)	**Case No. 99CV0782-L (JAH)**
Petitioner,	)	
v.	)	**Report and Recommendation**
A. TERHUNE, Director,	)	**For Order Dismissing**
Respondent.	)	**Petition for Writ of Habeas**
	)	**Corpus**

BACKGROUND

Petitioner, JESSE HERNANDEZ, is a state prisoner who, by and through his attorney of record Nicholas De Pento, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the legality of his conviction by the trial court and alleging ineffective assistance of counsel at trial.

This Court has throughly reviewed Hernandez's amended petition, respondent's motion to dismiss, Hernandez's reply memorandum, and all supporting documents submitted by both parties. After considering all the documents submitted, this Court recommends denial of the petition without prejudice based on petitioner's failure

to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) as to his two claims presented in the petition.

PROCEDURAL HISTORY

On July 8, 1996, a six-count information was filed charging petitioner with attempted murder (Count 1), possession of a destructive device (Count 2), attempted arson (Count 3), misdemeanor vandalism (Counts 4 and 5), and stalking (Count 6). (Lodgement 1 at 9).

On July 9, 1996, petitioner's jury trial commenced. (Id. at 144). On July 17, the jury found petitioner guilty of all six counts. (Id. at 157). Consequently, on September 9, 1996, petitioner was sentenced to life in prison with the possibility of parole. (Id. at 168). Shortly, thereafter, petitioner appealed. (Id. at 138).

On April 14, 1998, in an unpublished opinion, the California Court of Appeal affirmed petitioner's conviction. (Lodgement 2). Petitioner then filed a petition for writ of habeas corpus to the California Supreme Court on June 8, 1998. (Lodgement 3). In that petition, petitioner claimed ineffective assistance of counsel due to his trial counsel's failure to challenge the sufficiency of evidence admitted and failure to move for severance of trials. Id. The California Supreme Court denied this first petition on the grounds that the petition was untimely filed, thus, never reaching the merits of petitioner's claims.

On April 16, 1999, petitioner filed a habeas corpus action to the U.S. District Court for the Southern District of California. Subsequently, on May 4, the Honorable Barry T. Moskowitz, United States District Court Judge, dismissed the action without prejudice for petitioner's failure to allege exhaustion of state judicial remedies.[1]

On July 1, 1999, petitioner filed a second petition for writ of habeas corpus before the California Supreme Court. In that petition, petitioner alleged ineffective assistance of counsel due to his appellate counsel's failure to timely file his initial habeas corpus petition before the state Supreme Court. (lodgment 4). The California Supreme Court denied this second petition on September 29, 1999.

Petitioner then filed the instant petition in federal court on July 7, 1999. Here, petitioner alleges ineffective assistance of his trial counsel, not his appellate counsel. Now, the Court issues this report and recommendation with respect to this amended petition.

DISCUSSION

I. Exhaustion Requirement

Applicants for writs of habeas corpus must exhaust state court remedies prior to proceeding in federal court, and petitions that contain even one unexhausted claim must be

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[1] See Order Dismissing Action for Failure to Allege Exhaustion. (May 4, 1999).

dismissed. Duncan v. Henry, 513 U.S. 364 (1995); Rose v. Lundy, 455 U.S. 509 (1982). The exhaustion of available state remedies is a prerequisite to a federal court's consideration of claims presented in habeas corpus proceedings. 28 U.S.C. § 2254(b); see Rose, 455 U.S. at 522; McQueary v. Blodgett, 924 F.2d 829, 833 (9th Cir. 1991).

As a matter of federal-state comity, federal courts will not consider a claim in a habeas corpus proceeding until the state courts have had an opportunity to act upon the claim. Rose, 455 U.S. at 515. The exhaustion requirement assures the state courts of the "initial 'opportunity to pass upon' and correct alleged violations of its prisoners' federal rights." Picard v. Connor, 404 U.S. 270, 275 (1971) (quoting Wilwording v. Swenson, 404 U.S. 249, 250 (1971). The exhaustion requirement also "prevent[s] [the] disruption of state judicial proceedings," Rose, 455 U.S. at 518, and serves "the federal interest in economizing scarce federal judicial resources." Jennison v. Goldsmith, 940 F.2d 1308, 1311 (9th Cir. 1991).

Dismissal of a petition is dictated by the doctrine of comity. Rose, 455 U.S. at 518. Under the doctrine of comity, "'one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and cognizance of the litigation, have had an opportunity to pass on the matter.'" Id. at 518 (quoting Darr v. Burford, 338 U.S. 200, 204 (1950)). As such, the exhaustion of state remedies is required to uphold "the state courts' role in the

enforcement of federal law and [to] prevent [the] disruption of state judicial proceedings." Rose, 455 U.S. at 518.

To exhaust a habeas claim properly, a petitioner must present all contentions in support of his petition to the state supreme court, including all legal authorities and arguments. Gatlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999). In addition, the substance of petitioner's contentions must be "fairly presented" to the state courts, including its highest court, and the courts must dispose of the claims on the merits. Castille v. Peoples, 489 U.S. 346, 351 (1989); Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard, 404 U.S. at 275-78. A petitioner's claims are "fairly represented" when he has provided the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing on the constitutional claim. Anderson, 459 U.S. at 6 (citing Picard, 404 U.S. at 276-77).

II. Petitioner's Claims for Relief

In the instant petition, petitioner alleges that he was denied effective assistance of counsel at trial based on his attorney's failure to exclude prejudicial "other act" evidence and failure to sever improperly joined actions.

Respondent, in his motion to dismiss, argues that petitioner's claims of ineffective assistance of counsel at trial are unexhausted. Respondent asserts two grounds for dismissal of the petition: (1) that petitioner's state petition

is still pending; and (2) that petitioner's current federal claims are not fairly presented in his state petition. The first ground for dismissal is moot because petitioner's state petition is no longer pending with the California Supreme Court.[2] As to respondent's second ground for dismissal, this Court agrees with respondent that petitioner did not fairly represent his current claims of ineffective assistance of trial counsel before the California Supreme Court.

In his July 1, 1999, petition for writ before the California Supreme Court, petitioner claimed ineffectiveness of his appellate counsel for failing to timely file petitioner's first petition for review by the state Supreme Court. In contrast, petitioner now claims ineffective assistance of counsel regarding his trial counsel - a claim never reviewed by the California Supreme Court on its merits because of petitioner's failure to timely file the petition so alleging that claim. Although petitioner's claims regarding ineffective assistance of his trial and appellate counsel may be related, the claims are not the same. By presenting a different claim to this Court - ineffective assistance of trail counsel - than that submitted to the California Supreme Court - ineffective assistance of appellate counsel - petitioner has failed to provide the state court with a "fair opportunity" to adjudicate the petitioner's instant claims of incompetent performance as to his trial counsel.

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[2]Exhibit A in petitioner's reply papers shows the California Supreme Court Order denying state petition for writ of habeas corpus. (September 29, 1999).

Thus, this Court finds that the California Supreme Court has not had the opportunity to decide the merits of petitioner's instant claims of ineffective assistance of counsel at trial. According to the United States Supreme Court, for purposes of federal habeas relief, a petitioner's claims are "fairly represented," and thus fully exhausted, when the substance of petitioner's contentions are presented to the state courts and disposed of on the merits. Castille, 489 U.S. at 351. Absent a showing of sufficient cause or presentation of a procedural bar, this Court is disinclined to make an exception to the exhaustion requirement. Therefore, petitioner's instant claim remain unexhausted because the state courts have not yet considered the merits of the claims presently before this Court.

Accordingly, this Court recommends that the District Court DISMISS WITHOUT PREJUDICE petitioner's petition for writ of habeas corpus for failure to satisfy the exhaustion requirement.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, this Court recommends that the District Court **DISMISS WITHOUT PREJUDICE** petitioner's petition for writ of habeas corpus for failure to exhaust. This report and recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). IT IS ORDERED that no later than **December 30, 1999**, any party to this

action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **January 14, 2000**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: December 1, 1999

/S/
JOHN A. HOUSTON
United States Magistrate Judge

cc: Judge Lorenz
All Counsel of Record

SA-9

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESSE DALE HERNANDEZ,	)	**Case No. 99CV0782-L (JAH)**
Petitioner,	)	
	)	**Order Adopting Report and**
v.	)	**Recommendation, Denying**
A. TERHUNE, Director,	)	**Petition for Writ of Habeas**
Respondent.	)	**Corpus and Overruling**
	)	**Petitioner's Objections**

Petitioner Jesse Hernandez filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. In his petition, petitioner contends his trial attorney provided ineffective assistance in violation of the Constitution. Respondents were ordered to brief whether petitioner had exhausted his claim of ineffective assistance of trial counsel. On December 3, 1999, pursuant to 28 U.S.C. § 636(b)(1), the magistrate judge filed a Report and Recommendation ("R&R") recommending denial of petitioner's habeas petition. Petitioner filed his Objections to the R&R on December 30, 1999; respondent did not file a reply to the Objections.

Having fully considered the matters presented, the Court adopts the R&R and denies petitioner's petition for writ of habeas corpus.

DISCUSSION

Before a federal court may consider granting habeas relief, a federal habeas petitioner must exhaust all available state court remedies on direct appeal and by collateral proceedings. Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992). The habeas petitioner must "fairly present" to the state courts the "substance" of his federal habeas corpus claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Fairly presenting a claim requires that the petitioner raise in the state court proceeding both the operative facts and the legal theory upon which the claim is based. Id.

As discussed in the R&R, petitioner's conviction was affirmed by the California Court of Appeals on April 14, 1998. Thereafter, petitioner filed a petition for review in the California Supreme Court in which petitioner argued ineffective assistance of trial counsel based upon an alleged failure to challenge the sufficiency of evidence admitted and failure to move for severance of counts. The California Supreme Court denied the petition as untimely pursuant to California Rules of Court 24(a) and 28(b).

Petitioner then filed his first federal petition for writ of habeas corpus which the district court dismissed without prejudice for failure to exhaust state remedies. Petitioner then filed in the California Supreme Court a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel for counsel's failure to file petitioner's initial state petition for review in a timely manner. The

California Supreme Court denied this second petition in September 1999.

Petitioner brings the present federal habeas petition alleging ineffective assistance of trial counsel based upon trial counsel's failure to exclude "other act" evidence and failure to sever counts. Petitioner contends because he has exhausted his state petition for writ of habeas corpus concerning ineffective assistance of appellate counsel, he has exhausted both claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. Based on this procedural history, petitioner argues the ineffective assistance of appellate counsel claim demonstrates the cause showing necessary to excuse a procedural default.

A habeas petitioner's procedural default of his claims in state court will not foreclose federal review of those claims if the petitioner can show "cause" for his default, i.e., "some objective factor external to the defense" prevented the petitioner from complying with the state procedure under which he is alleged to have defaulted his claim. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Ineffective assistance of counsel may show cause for a procedural default if it amounts to an independent constitutional violation. Id. This is the position petitioner take here: petitioner's appellate counsel failed to file a post-conviction brief, i.e., a Petition for Review, within the time provided under California Rules of Court 24(a) and 28(b). See Petitioner's Objections to Report and Recommendation at 1.

But as a recent Ninth Circuit notes, there is no constitutional right to an attorney in state post-conviction proceedings and "[t]herefore, any ineffectiveness of [petitioner's] attorney in the post-conviction process is not considered cause for the purposes of excusing the procedural default at that stage." *Manning v. Foster*, 2000 WL 1180554, 3 (9th Cir. August 22, 2000) (*citing Coleman, 501 U.S. at 752* and Ortiz v. Stewart, 149 F.3d 923, 933 (9th Cir. 1998). Thus, ineffective representation in post-conviction proceedings does not constitute cause for procedural default.

As noted in the R&R, petitioner's current claims before this court of ineffective assistance of trial counsel were never considered by the California Supreme Court because petitioner failed to timely file the petition for review with this claim asserted. Thus, the ineffective assistance of trial counsel claims have not been exhausted. Moreover, the presentation of petitioner's ineffective assistance of appellate counsel claim to the California Supreme Court does not provide cause for the exhaustion requirement with respect to petitioner's ineffective assistance of trial counsel claim. Accordingly, the Court adopts the magistrate judge's Report and Recommendation, finds petitioner's

claims are unexhausted, and dismisses without prejudice petitioner's petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: 8/30/2001 /s/

M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE